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True Confessions

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> Rubashov was silent. Quite a long time passed. Ivanov's head bent even closer over the writing desk.
>
> "I don't understand you," he said. "Half an hour ago you made me a speech full of the most impassioned attacks against our policy, any fraction of which would have been enough to finish you off. And now you deny such a simple logical deduction as that you belonged to an oppositional group, for which, in any case, we hold all the proofs."
>
> "Really?" said Rubashov. "If you have all the proofs, why do you need my confession?"[1]

The fifth amendment's self-incrimination clause is a puzzle. Its defenders hail it as "one of the great landmarks in man's struggle to make himself civilized."[2] This is so because "[t]he essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and

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1. A. Koestler, Darkness at Noon 73 (1941).
2. E. Griswold, The Fifth Amendment Today 7 (1955).

needs no illustration. It is plain to every person who gives the subject a moment's thought."[3] Yet apparently civilized lawyers who seem to have thought about the matter for more than a moment—Jeremy Bentham,[4] Benjamin Cardozo,[5] and Henry Friendly[6] come to mind—have concluded that the privilege is an unnecessary and anachronistic impediment to the efficient discovery of truth in criminal prosecutions.[7]

These conflicting intuitions about the privilege present a familiar dilemma for constitutional law. Liberal theories of constitutionalism rest on our ability to articulate noncontroversial "neutral" standards of substantive political morality—standards abstracted from day-to-day political controversy—against which political outcomes can be measured. The existence of such standards is what justifies constitutionalism—what makes it an exercise in law, rather than power. But the effort to find and defend yardsticks has proved strikingly unsuccessful. Intuitions specific enough to resolve controversial questions of political morality are, themselves, generally controversial enough to make the claim of neutrality implausible. Conversely, intuitions that are truly abstracted from political controversy are, for that reason, likely to be too vague to resolve such controversy.[8]

This difficulty in justifying substantive, nonconsequentialist inhibitions on the use of government power has driven many constitutional theorists to process-based or consequentialist approaches. These approaches treat the legitimacy of ends as exogenous to the analysis and focus on supposedly less controversial questions about the process by which ends are determined and the means by which ends are achieved.[9]

In this essay, I explore both the promise and the limits of this approach

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3. Brown v. Walker, 161 U.S. 591, 637 (1896) (Field, J. dissenting).

4. 5 J. Bentham, Rationale of Judicial Evidence 207-83 (1827).

5. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) ("[T]here are students of our penal system who look upon the [privilege] as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry").

6. *See* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968).

7. Justice Stevens has written that "the roster of scholars and judges with reservations about expanding the Fifth Amendment privilege reads like an honor roll of the legal profession." Lakeside v. Oregon, 435 U.S. 333, 345 n.5 (dissenting opinion). He cites works by Wigmore, Corwin, Pound, Friendly, Schaefer, and Traynor.

For a recent, comprehensive attack on the various rationales for the privilege see Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 U.C.L.A. L. Rev. 1063 (1986). The privilege leads not only to the acquittal of defendants who are guilty, but also to the conviction of defendants who are innocent. For a discussion, see Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 Geo. L.J. 1 (1989).

8. The point is a familiar one. For important elaborations on it, see Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063, 1084-89 (1981); Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1371-82 (1984).

9. The best known efforts along this line are J. Ely, Democracy and Distrust (1980) and H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making And Application of Law (tent. ed. 1958). For a recent discussion of the sources of such efforts, see Peller, *Neutral Principles in the 1950's*, 21 U. Mich. J.L. Ref. 561 (1988).

to constitutionalism in the context of the fifth amendment privilege.[10] Parts One and Two are about the promise. I argue that the privilege can be defended by reversing the usual assumption that it is rooted in deontological theory and that objections to it are consequentialist in character. On the contrary, I argue that the privilege guarantees that government coercion will be utilized only when it is a rational means rather than an end in itself.[11] More specifically, the privilege prevents the imposition of excessive punishment caused by the failure to incorporate the full cost of such punishment into the cost/benefit equation.

My argument for this proposition rests on the ambiguous relationship between coercion and truth. In order to understand that relationship, it is useful to distinguish between the truth of statements concerning internal hopes, desires, and beliefs and the truth of statements concerning external facts about the world. Coercion, I argue, is a rational strategy for generating the second sort of statement but not the first. When coercion is utilized to secure statements concerning internal mental states, it serves the interests of legitimation rather than of truth. The privilege, then, can be understood as a prophylactic rule designed to protect against the legitimation of excessive punishment—legitimation produced by the illusion that the defendant himself desires or accepts the punishment.

Part Three of this paper explores the limits of this sort of analysis. I argue that a consequentialist defense of the fifth amendment must be premised on a radically individualistic theory about preferences. But this theory is controversial. If we instead suppose that preferences are socially constructed, the distinction between internal hopes and desires and external facts in the world becomes much more difficult to maintain.

In fact, the law of self-incrimination is premised on contradictory views about the social nature of preferences—views that reflect an underlying antinomy in general constitutional theory. It is our inability to resolve this contradiction that ultimately makes discussion of the fifth amendment confused and unsatisfying.

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10. I therefore do not address various nonconsequentialist justifications for the fifth amendment privilege. For two especially illuminating examples of such defenses, see Greenawalt, *Silence as a Moral and Constitutional Right*, 23 Wm. & Mary L. Rev. 15 (1981) and Gerstein, *Privacy and Self-Incrimination*, 80 Ethics 87 (1970). There is a sense in which those portions of this essay focussing on the problems posed by consequentialist defenses can be read as support for nonconsequentialist justifications. For my views on some of the difficulties posed by nonconsequentialist constitutional argument, see Wasserstrom & Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L.J. 19, 59-67 (1988).

11. For an important effort to justify the fifth amendment that utilizes a similar perspective, but relies upon a different set of arguments, see Stuntz, *Self-Incrimination and Excuse*, 88 Colum. L. Rev. 1227 (1988).

I. Consent and "Consent": The Problem of Coercion and Truth

Defenders of the privilege have occasionally argued that there is a necessary inconsistency between the use of compelled testimony on the one hand and the search for truth on the other. They have maintained that the mere fact of compulsion tends to impeach the reliability of any statement made under the influence of that compulsion.[12]

In recent years this explanation for the fifth amendment privilege has fallen into disfavor, and for good reason.[13] In part, the explanation seems to be premised on a confusion between coercing a person to speak and coercing him to speak certain words. We might distrust the testimony of someone who is told that he will be punished more severely unless he confesses to a crime. But there is not a similar reason to distrust the confession of someone who is simply compelled to tell what he knows. The assertion that coerced statements of this sort are inherently untrustworthy is strikingly implausible in light of our regular reliance on such statements in contexts where they are not incriminating.

Moreover, even in situations where a defendant is not just compelled to speak but also told what to say, there is no necessary reason why the compelled statements should be treated as unreliable. A truth-based theory of the fifth amendment fails to account for our refusal to admit coerced statements into evidence when there are indicia of reliability, such as when a coerced defendant reveals knowledge that only the perpetrator of the offense could have had.[14]

There is a special category of cases, however, where it may seem that a logical or necessary inconsistency exists between the truth of a statement and the fact that the statement was coerced. In cases where we are interested in a person's internal preferences and beliefs rather than facts about the world, compulsion might be thought to reveal only the external manifestations of beliefs and not the actual beliefs themselves. Consider, for example, the Supreme Court's decision last term in *Doe v. United States*.[15] The case arose out of the government's efforts to secure bank records of the target of a grand jury investigation into the fraudulent manipulation of oil cargoes and receipt of unreported income. Initially, the

12. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (privilege rooted in distrust of self-deprecatory statements and need to protect the innocent); Michigan v. Tucker, 417 U.S. 433, 448-49 & n.23 (1974) (privilege protects courts from reliance on untrustworthy evidence).

13. *See, e.g.*, Dolinko, *supra* note 7, at 1074-77.

14. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 541 (1961):

> To be sure, confessions cruelly extorted may be and have been to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.

15. 108 S. Ct. 2341 (1988).

grand jury subpoenaed from Doe (the target) the records of transactions in three named banks in the Cayman Islands and Bermuda. Although Doe produced some of the records, he testified that none of the additional records were in his possession or control. The government thereupon subpoenaed the foreign banks for the records, but the bank refused to comply, citing bank secrecy laws of Bermuda and the Cayman Islands that prohibit disclosure of account records without the customer's consent.[16]

Undeterred by these setbacks, the government then petitioned the district court for an order directing Doe to sign a "consent directive" instructing any bank at which Doe had a bank account to disclose documents relating to the account to the grand jury. Citing his privilege against compulsory self-incrimination, Doe refused to execute the form. He was held in contempt, and Justice Blackmun, writing for eight justices, affirmed this judgment, thereby rejecting Doe's fifth amendment claim.

In order to follow the Court's analysis, it is first necessary to comprehend the basic structure of modern fifth amendment doctrine. The Court has held that a suspect who wishes to rely on the fifth amendment privilege must show that three separate factors coalesce. First, she must show that the statement is incriminating. This means that there must be a risk that either the statement, or fruits derived from the statement, will at some point be introduced against the person relying on the privilege in a criminal trial.[17]

Second, she must show that there has been compulsion. The compulsion can consist of a court order, such as a subpoena requiring the testimony,[18] or the threat of physical or psychological pressure, such as use of the third degree in police interrogations,[19] or more informal pressure, such as threat of loss of employment if the fifth amendment privilege is not waived.[20]

Finally, the suspect must show that the statement is "testimonial." As

16. *Id.* at 2343-44.

17. *See, e.g.,* Kastigar v. United States, 406 U.S. 441, 453 (1972) (use and derivative use immunity satisfies fifth amendment by insuring that testimony cannot lead to infliction of criminal penalties on witness); Westen & Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response"*, 19 Am. Crim. L. Rev. 521, 524 (1982) (exclusion of incriminating statements from future criminal prosecutions satisfies fifth amendment).

One might suppose that this requirement would mean that a potential defendant could never object to the application of compulsion against him, since the later availability of automatic or constructive use immunity would defeat any future fifth amendment claim if the state attempted to introduce the compelled testimony against him. But the Supreme Court has held that the state may not rely upon constructive use immunity to justify compulsion. Rather, before it applies the compulsion, it must formally immunize the witness in cases where there is a risk of future incrimination. *See* United States v. Doe, 465 U.S. 605, 616 (1984). This requirement is not necessary to protect the witness, who would be fully protected by later immunity. Rather, it is necessary to protect the state, which might otherwise inadvertently complicate a future prosecution by the necessity of proving an independent source for all evidence introduced against the defendant. *Id.*

18. *See, e.g.,* United States v. Doe, 465 U.S. 605, 612 (1984).

19. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 460-63 (1966).

20. *See, e.g.,* Lefkowitz v. Turley, 414 U.S. 70, 78 (1973).

discussed in greater detail below,[21] it is not altogether clear from the Court's cases what this requirement consists of. But for present purposes, we can say that requirement means that the statement must require her to employ her cognitive faculties to relate some factual assertion or disclose information. The Court has used the requirement to hold that compelling defendants to submit to blood tests,[22] fingerprinting,[23] lineups,[24] and handwriting[25] and voice identification procedures[26] does not implicate fifth amendment rights.

How should this tripartite test be applied to *Doe*? The test indicates that neither Doe nor his banks would have a fifth amendment privilege to resist production of bank records incriminating Doe that were in possession of the banks. True, Doe would be incriminated by these records, but he would not be compelled to do anything if the subpoena were served on the banks. The banks would be compelled, but they would not be incriminated by the records. Because the compulsion and the incrimination must coalesce—because the same person who is compelled must also be incriminated—a subpoena on the banks would not implicate fifth amendment rights.[27] Thus, the government's difficulty in enforcing the subpoena against the banks derived from local Bermudian and Cayman Island law, rather than from the fifth amendment privilege.

It is also probably true that even if Doe himself had possessed the bank records, the government could have compelled him to produce them. One might suppose that in these circumstances Doe would have a valid fifth amendment claim because a subpoena directed to him would constitute compulsion, and the documents the government sought were incriminating. But although a subpoena compels Doe to produce the documents, he is not thereby compelled to create them. Thus, the documents themselves are incriminating but not compelled. Of course, the *production* of the documents is compelled. But ordinarily, the mere act of production is not incriminating. Compliance with a subpoena does implicitly testify that the documents the government sought exist, that the suspect is in possession of them, and that the documents produced are the documents named in the subpoena.[28] The Court has recognized that there may be occasions when this testimony is incriminating, such as when possession of the documents is itself an unlawful act or when the suspect's implicit authentication of the documents when he responds to the subpoena might be used against

21. *See infra* text accompanying notes 30-35.
22. *See* Schmerber v. California, 384 U.S. 757 (1966).
23. *Id.* at 764.
24. *See, e.g.*, United States v. Wade, 388 U.S. 218, 221-23 (1967).
25. *See* Gilbert v. California, 388 U.S. 263, 266-67 (1967).
26. *See* United States v. Dionisio, 410 U.S. 1, 5-7 (1973).
27. *See, e.g.*, Fisher v. United States, 425 U.S. 391 (1976); Couch v. United States, 409 U.S. 322 (1973).
28. *See* Fisher v. United States, 425 U.S. 391, 410 (1976).

him. When this is so, the suspect has a fifth amendment right to decline production.[29] But in many other cases, there is little or no prospect that the act of production will testify to any facts that the government will use against the suspect. In such cases, it is the documents themselves, rather than the act of production, that are incriminating.

Even if the act of production itself is not incriminating, it might be thought that the failure to produce is privileged because the fruits of that act—the documents themselves—are incriminating. But such a claim would founder on the third element of a fifth amendment violation—the testimonial requirement. As long as the act of production does not convey to the government "testimonial" information used to convict the accused, it does not implicate fifth amendment rights.

It was the "testimonial" requirement that ultimately defeated Doe's fifth amendment objection to the consent directive. Execution of the directive was surely compelled, and there can be no doubt that this compelled execution might lead to incriminating evidence that the government otherwise would not have been able to obtain. But the Court held that the directive was not testimonial and that the government could therefore force Doe to execute it.[30]

The Court's analysis of the "testimonial" component of the self-incrimination clause masks a continuing confusion about the meaning of the requirement and the reasons for its existence. The Court insisted that the consent directive was not testimonial because "neither the form nor its execution communicates any factual assertions, implicit or explicit, or conveys any information to the Government."[31] The form did not acknowledge the existence of any account in a foreign financial institution or tell the government where to find such an account. By signing the form, Doe made no statement—explicit or implicit—about the existence of accounts, and his execution of the form would not admit the authenticity of any records subsequently prepared or released by the banks.

But this formulation of what it means for a statement to be "testimonial" does not quite capture the Court's prior holdings on the subject. For example, in *Schmerber v. California*,[32] the Court upheld compelled blood tests for the purpose of measuring the blood alcohol of a drunk driving suspect. There is a sense in which these compelled tests did disclose incriminating information about the accused—i.e., that he was drunk at the time the test was taken. It would seem, therefore, that all three components of a fifth amendment violation were present.

Schmerber might nonetheless be rationalized on the theory that compelled submission to a blood test did not implicate any of the suspect's

29. *See, e.g.*, United States v. Doe, 465 U.S. 605, 612 (1984).
30. 108 S. Ct. at 2350-52.
31. *Id.* at 2351.
32. 384 U.S. 757 (1966).

rational or cognitive faculties. True, Schmerber's blood "testified" to something about him. But it did so without Schmerber's willing it to do so.[33] If one reads the fifth amendment as premised on the "mind-body" distinction and as privileging only willed acts that bring about self-destruction, then the result in *Schmerber* logically follows.

It is not obvious that this distinction can, in fact, be maintained or that the fifth amendment privilege should be interpreted as tracking it. But for present purposes, there is a more significant difficulty with this reading of *Schmerber*: The consent directive in *Doe*, unlike the blood test in *Schmerber*, *did* implicate the suspect's rational faculties. Schmerber could be made to submit to the blood test against his will. Doe, in contrast, had to decide to sign the consent directive. His decision amounted to an exercise of his will—an exercise that was both compelled and incriminating.

Doe can be reconciled with *Schmerber* if one interprets the privilege as forbidding the compelled use of cognitive faculties only in circumstances where what is revealed is itself a product of those faculties. On this view, neither Schmerber nor Doe had a valid fifth amendment claim because neither was asked to share his thoughts, beliefs, or knowledge with the government.[34] It is true that the government could secure the consent directive from Doe only by compelling him to "choose" to execute it. It is also true that the blood test in *Schmerber* revealed to the government information it would not otherwise have possessed. But in neither case did the compelled conduct invade the private enclave consisting of the suspect's personal mental state.[35]

A preference coercion theory of the privilege is helpful in explaining why this enclave should be treated as sacrosanct. Such a theory need not

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33. Justice Fortas apparently had a distinction of this sort in mind when he distinguished between forcing a defendant to stand in a lineup and forcing him to speak certain words for identification purposes. United States v. Wade, 388 U.S. 218, 260-61 (1967) (Fortas, J., dissenting). Compelled participation in a lineup was permissible in his view because it did "not require the accused to take affirmative, volitional action." In contrast, requiring a defendant to speak certain words, even for identification purposes, was "more than passive, mute assistance" and amounted to "the kind of forced cooperation by the accused . . . which is within the historical perimeter of the privilege against compelled self-incrimination." *Id.*

34. *See also* United States v. Dionisio, 410 U.S. 1, 5-7 (1973); United States v. Wade, 388 U.S. 222-23 (1967).

35. This approach produces some odd results. If Doe had been compelled to tell the government in which banks he had accounts, and the government then used this information to secure the records from the banks, the records would apparently be inadmissible. *See* Curico v. United States, 354 U.S. 118 (1957) (custodian of union records cannot be forced to testify as to their location when records would incriminate him). This result follows from the fact that Doe's statements were testimonial, and the records are a fruit of those statements. Yet the government could apparently require Doe to get the records himself and give them to the government so long as he was not required to tell the government where he got them. *Cf.* Braswell v. United States, 108 S. Ct. 2284 (1988) (custodian of corporate records can be compelled to produce them even though they incriminate him). This result seems to follow from *Fisher*, where the court indicated that it would uphold a subpoena requiring the defendant himself to produce the documents in question. Although the defendant would be required to utilize his cognitive faculties in order to secure the documents, he would not thereby be revealing his thoughts or beliefs to the government.

I am grateful to Steve Schulhofer for bringing this anomaly to my attention.

rest upon a mystical mind-body distinction or a natural law conception of the appropriate limits of government power. Rather, it can be defended on the ground that the use of compulsion to reveal a suspect's internal preferences is inherently irrational. To the extent that such an internal mental state is legally relevant, disclosure of it *cannot* be compelled because the act of compulsion destroys its internal character.

Although the *Doe* Court nowhere articulated this theory, the theory's power is amply demonstrated by the Court's struggle to avoid its consequences. Superficially, one might think that the consent directive *did* reveal something about Doe's internal mental state. If the directive were read as stating that Doe in fact consented to government access to his records, it would be testimonial in this sense. The Court recognized this possibility, but dismissed it on the theory that the "directive explicitly indicates that it was signed pursuant to a court order" and that the execution of the form therefore "sheds no light on [Doe's] actual intent or state of mind."[36]

Thus, the document, in effect, impeaches itself. The very fact that the directive is compelled by court order means that it *cannot* be what it purports to be—i.e., a document reflecting Doe's actual consent. Indeed, even in the unlikely event that Doe in fact consented to government access, a form executed under these circumstances cannot reveal that fact to us.

The real mystery that *Doe* leaves unanswered is what interest the government could possibly have had in forcing Doe to execute a "consent directive" that does not reflect his actual consent. The Court attempted to avoid the question by treating the effect of the compelled "consent" as a matter of Bermudian and Cayman Islands law not then before it.[37] It was thus unnecessary to determine what use, if any, the government could make of the document.

But this dodge is hardly very satisfying. It is difficult to see how such a document could possibly satisfy the policies behind Bermudian and Cayman Islands law. The bank secrecy requirements seem to make the actual consent of the depositor determinative. Any other interpretation of the requirements would turn them into a hypocritical charade.[38]

If actual consent is required, then, as the Court itself recognized, a compelled consent directive could not possibly satisfy that requirement. Paradoxically, the government was victorious in *Doe* precisely because the

36. 108 S. Ct. at 2351.

37. *Id.* at 2351-52 n.16.

38. Indeed, the Grand Court of the Cayman Islands had expressly held that consent compelled by a court order was not valid consent under the Island's confidentiality law. *In re* ABC, Ltd., 1984 C.I.L.R. 130. The Grand Court held that "where consent is a material element giving rise to a legal consequence, it must be voluntarily and freely given in the exercise of an independent and uncoerced judgment." *Id.* at 134-35. In an amicus brief submitted in *Doe*, the government of the Cayman Islands stated that "Cayman banks presented with such a compelled consent remain subject to criminal prosecution in the Cayman Islands if they disclose their customers' records to others." Brief of the Government of the Cayman Islands as Amicus Curiae at 5, *Doe* (No. 86-1753).

directive did not accomplish its objectives. If the directive had incorporated Doe's actual consent, which the government almost certainly needed to satisfy Cayman Island and Bermudian law,[39] then the execution of the directive would have been testimonial and violative of the fifth amendment privilege.[40]

In fact, the government's insistence on the *Doe* directive may be less pointless than the Court's opinion makes it seem. In Part II, I will argue that the government sometimes has an interest in taking advantage of the legitimating force of such a document, even when the document cannot be what it purports to be. On this argument, the function of the fifth amendment is to prevent the government from creating the illusion of consent when it cannot produce the real thing. If the argument is correct, then perhaps the *Doe* Court should have upheld Doe's claim even though—indeed, precisely because—the consent directive could not reveal Doe's actual consent.

For present purposes, however, *Doe* can be taken to stand for the general point that, at least in certain contexts, the fifth amendment states a conceptual rather than a normative truth. The point is not that the government *ought not* to coerce statements regarding internal mental states. Rather, the government *cannot* coerce such statements because the application of coercive pressure makes them something other than statements regarding internal mental states. Thus, the *Doe* Court holds that, as a normative matter, the government was free to coerce Doe into executing the consent directive. But by doing so, the government necessarily gave up the possibility of discovering Doe's actual mental state.[41]

There are several attractive features to a theory of the fifth amendment premised on the irrationality of the effort to coerce preferences. First, such a theory avoids reliance on controversial and question-begging intuitions about natural law. This argument for the privilege does not rest on inherent limits on governmental power or on inalienable individual rights. Instead, it merely insists that exercises of coercion be justified on their own

39. *See supra* note 37.

40. According to Doe's attorney, following the Supreme Court's decision a hearing was arranged before the U.S. district court, at which Doe signed the consent directive. The public record does not reveal any action by the government attempting to enforce the directive. Telephone interview by the author with Richard Timbie.

41. In order to forestall misunderstanding, I want to emphasize that the argument outlined here depends upon a willingness to see preferences as belonging to us as individuals and as existing prior to social interaction. I think that this view is attractive enough to make the argument both plausible and interesting. But it is also profoundly problematic. If one is prepared to treat preferences as neither autonomous nor individual, then there is nothing irrational about the effort to manipulate them. But, as we shall see, this competing view of preferences introduces problems of its own. My hope is that readers will be willing to accept provisionally an individualistic model of preferences so as to see how far this model will take us in thinking about the fifth amendment privilege. After making the best argument I can muster for the privilege on this assumption, I will relax the assumption at the end of this essay and explore the complexities that are introduced if one holds a different view of how we come to have preferences.

terms. When coercion is a sensible means of revealing the truth and thereby advances the state's end, there should be no obstacle to its use. It is only when coercion is not useful—when it is not a sensible means, but can be rationally explained only as an end in itself—that the privilege is an obstacle to the use of government power.

Thus, a preference coercion theory of the privilege flips the usual alignment of consequentialist and nonconsequentialist argument. Most standard accounts of the privilege force its defenders to explain why we should insist on a right to remain silent as a good in itself in the face of obvious good consequences that would flow from compelled testimony. In contrast, the approach outlined above puts the burden on opponents of the privilege to defend coercion in circumstances where it seemingly accomplishes nothing.

Second, a preference coercion theory helps to explain the outcome of some cases that would otherwise be quite mysterious. Suppose, for example, that prior to the *Doe* litigation, Doe had written in his personal diary that he had no objection to government access to his bank account. As noted above, current law might permit the government to subpoena this diary entry and use it against Doe.[42] If one treats the fifth amendment as embodying a normative restraint on government invasions of personal privacy, this result is difficult to comprehend. The subpoena of the diary, no less than compelled testimony as to a defendant's current preferences and beliefs, reveals the defendant's private thoughts and desires.

From a preference coercion perspective, the distinction is more defensible. Ironically, the subpoena of the diary is permitted precisely because it is an effective means of invading the privacy of Doe's internal thought processes. This is so because the diary entry translates internal desires into a material object that is not modified by the act of production. If Doe was not compelled to make the diary entry, there is no inherent reason to doubt the truth of his statements. He can therefore be compelled to produce the statements without distorting their content. In contrast, if the state compels Doe to articulate present, internal preferences, the compulsion necessarily changes the internal character of the preferences, thereby defeating the state's ends.

A preference coercion theory also has the advantage of putting current fifth amendment doctrine in touch with the historical roots of the privilege and with other important currents in constitutional thought. Historically, the fifth amendment evolved from efforts to coerce political and religious conformity. As Professor Levy writes:

> Above all, the right was most closely linked to freedom of religion

42. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 408-09 (1976). The statement in the text assumes either that production of the diary is non-testimonial or that the prosecution has granted the defendant production immunity.

> and speech. It was, in its origins, unquestionably the invention of those who were guilty of religious crimes, like heresy, schism, and nonconformity, and, later, of political crimes like treason, seditious libel, and breach of parliamentary privilege—more often than not, the offense was merely criticism of the government, its policies, or its officers. The right was associated then with guilt for crimes of conscience, of belief, and of association. In the broadest sense it was a protection not of the guilty, or of the innocent, but of freedom of expression, of political liberty, of the right to worship as one pleased.[43]

It is hardly a coincidence that the privilege developed as an adjunct to protection of religious and political liberty. The effort to control political and religious belief founders on the same contradiction as the effort to compel consent. Of course, to the extent that religious and political dissent manifests itself in conduct, there is nothing inherently irrational about attempts to punish, and so control, that conduct. But often, conduct is relevant only because it serves as an external sign of internal disagreement. The effort to control conduct, then, amounts to an effort to change the internal system of beliefs that the state finds objectionable. But defenders of a preference coercion theory would argue that such an effort is irrational. Belief that something is true cannot be premised solely on the fact that it is useful to believe that it is true. Therefore, the threat of punishment cannot secure actual belief.

At its inception, then, the privilege was at least partially motivated by a desire to prevent the state from attempting to do what, in the nature of things, it cannot do.[44] There is no point in coercing statements of religious belief because statements secured under these conditions do not reflect the desired internal state, any more than Doe's execution of a "consent directive" reflected actual consent.

A similar insight is manifest in a variety of related constitutional principles. Consider, for example, the Supreme Court's famous condemnation of compelled flag salutes by children in *West Virginia State Board of Education v. Barnette.*[45] It might be thought that the flag salute is conduct

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43. L. Levy, Origins of the Fifth Amendment 332 (2d ed. 1986).

44. I make no claim that this was the only concern that produced the privilege. The creation of a right against self-incrimination, like the creation of other constitutional provisions, is overdetermined. Thus, in addition to its role in protecting religious and political freedom, the privilege

> became merely one of the ways of fairly determining guilt or innocence, like trial by jury itself; it became part of the due process of the law, a fundamental principle of the accusatorial system. The right implied a humane or ethical standard in judging a person accused of crime, regardless how heinous the crime or strong the evidence of his guilt. It reflected consideration for the human personality in that respect, but it also reflected the view that society benefited by seeking his conviction without the aid of his involuntary admissions. Forcing self-incrimination was thought not only to brutalize the system of criminal justice but to produce weak and untrustworthy evidence.

Id.

45. 319 U.S. 624 (1943).

that exists in the world and that there is no inherent contradiction in the state's effort to coerce this conduct. And indeed, Justice Jackson's majority opinion acknowledges that it is "not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning."[46]

But precisely because it would otherwise be "barren of meaning," the salute must be intended to signify actual belief. It is a "short cut from mind to mind,"[47] an outer sign of inner conviction. Because such conviction cannot be coerced, the compulsory salute ends up compelling the individual to utter "what is not in his mind."[48]

The Court's objection to such a ceremony is not so much that it is wrong as that it is pointless. As Justices Black and Douglas put it in their concurring opinion, "Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds."[49] Similarly, for Justice Jackson, the central difficulty with the attempt to short-circuit this consensual process is not (or at least not merely) a moral one. Rather, the objection rests on the "ultimate futility of such attempts to compel coherence."[50] According to Justice Jackson, "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . [The] First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.[51]

Since *Barnette*, the Supreme Court has fashioned a diverse and substantial body of constitutional law resting on closely related premises. For example, decisions invalidating various religious and loyalty oaths,[52] striking down mandatory school prayer[53] and compelled speech,[54] and rejecting anti-pornography legislation as an effort to control thought processes[55] seem to rest on a similar intuition.

Yet despite its force, there are important difficulties in fashioning a general theory of the fifth amendment privilege from this approach. The most fundamental difficulty is that it is not obvious that indoctrination efforts such as those undertaken in *Barnette* are bound to be futile. It is

46. 319 U.S. at 633.
47. *Id.* at 632.
48. *Id.* at 634.
49. *Id.* at 644.
50. *Id.* at 641.
51. *Id.*
52. *See, e.g.*, Bagget v. Bullett, 377 U.S. 360 (1962); Torcasso v. Watkins, 367 U.S. 488 (1961); Speiser v. Randall, 357 U.S. 513 (1958).
53. *See* Engel v. Vitale, 370 U.S. 421 (1962); School Dist. v. Schempp, 374 U.S. 203 (1963).
54. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald v. Tornillo, 418 U.S. 241 (1974).
55. *See* Stanley v. Georgia, 394 U.S. 557 (1969).

not clear, in other words, whether we fear that the state will fail when it attempts to coerce a change in internal preferences, or whether constitutional protection is necessary precisely because there is a risk that the state will succeed.

In Part III, I will discuss the implications of an approach that treats individual preferences as malleable through coercive social interaction. First, however, it is necessary to see why there might be a special risk in the criminal context that the state would engage even in futile efforts to restructure preferences.

II. The Fifth Amendment and the Legitimation of Punishment

It may at first seem implausible that one could develop a general theory of the fifth amendment privilege out of *Doe*. In many respects, the case is unusual. In more typical cases, the government appears to be uninterested in a defendant's internal desires and beliefs. Instead, government agents want to use coercion in order to secure testimony about prior events—precisely the sort of testimony that does not create the problems outlined above.

Doe is also atypical because it involved an effort to compel the particular *content* of an individual's statements, rather than simply the *fact* of a statement. In contrast, the privilege is often invoked to protect a defendant from speaking at all, even when the government makes no effort to dictate what the defendant will say.

These difficulties with a preference coercion approach are perhaps best illustrated by the Court's jurisprudence concerning custodial police interrogation. Before *Miranda v. Arizona*,[56] most of the law about such interrogation did not involve the fifth amendment privilege at all. For much of this period, the fifth amendment was thought to be inapplicable to state officers, who were responsible for many of the abusive practices that concerned the Court.[57] Moreover, despite scattered precedent to the contrary,[58] it was widely assumed that the privilege did not address the kind of informal, pretrial pressure that caused many defendants to confess in the station house.[59]

Consequently, the Court attempted to develop the law of police interrogation out of general due process principles. In each case, the Court at-

56. 384 U.S. 436 (1966).

57. *See* Twining v. New Jersey, 211 U.S. 78 (1908) (fifth amendment privilege not applicable in state prosecutions).

58. *See* Bram v. United States, 168 U. S. 532 (1897) (fifth amendment privilege violated in context of pretrial interrogation).

59. *See Developments in the Law: Confessions*, 79 Harv. L. Rev. 935, 960-61 (1966).

tempted to determine whether the defendant's will had been overborne by unacceptable police techniques.[60]

The cases that utilized this approach were unsatisfactory in a number of respects.[61] Because the Court lacked a coherent conception of free will, it never managed to articulate a general theory that explained what made particular police techniques unacceptable. The result was that the decisions of cases tended to be ad hoc, unpredictable and apparently unprincipled. They gave little guidance to lower court judges and to the police themselves as to the acceptable bounds of police behavior.

Moreover, the approach left the rights at stake substantially underenforced. Institutional limitations prevented the Court from examining more than a tiny fraction of the thousands of police interrogations that yielded confessions. And because each case rested on its own facts, it proved impossible to reduce the applicable legal requirements to rules that could be bureaucratically implemented in the absence of individualized judicial review.

Conventionally, *Miranda* has been understood as the Court's response to these difficulties. Faced with the choice of underenforcement or overenforcement, it chose a series of bright-line, prophylactic rules that held the promise of effectively guaranteeing the rights at stake over the range of cases at the cost of failing accurately to capture the nuances of each individual case to which the rules were applied.[62]

This tradeoff was accomplished by recharacterizing the effect of custodial interrogation. *Miranda*'s central holding was that the confluence of custody and interrogation created an irrebuttable presumption that there had been the kind of compulsion that triggered application of the fifth amendment privilege.[63] This compulsion could be dissipated only by reading to the defendant the now-famous warnings concerning his right to remain silent and to counsel. Since a defendant who confessed in the absence of warnings was necessarily compelled, his statements could not constitutionally be incriminating and therefore had to be suppressed in any ensuing criminal prosecution.

Most of the controversy surrounding *Miranda* has been generated by the Court's imposition of this exclusionary rule for confessions secured in

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60. For some representative examples, see Payne v. Arkansas, 356 U.S. 560 (1958); Colombe v. Connecticut, 367 U.S. 568 (1961); Spano v. New York, 360 U.S. 315 (1959).

61. For a classic discussion, see Y. Kamisar, Police Interrogation and Confessions 1-25 (1980)

62. For a recent defense of *Miranda* on these grounds, see Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988).

63. Almost a quarter century later, the legitimacy of this holding continues to spark debate. *Compare* Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 446-53 (1987) (*Miranda's* conclusive presumption of compulsion was an unquestionably legitimate act of adjudication and a reasonable reaction to the problems of the voluntariness test) *with* Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. Chi. L. Rev. 174, 178-86 (1988) (custodial interrogation does not always lead to compulsion; the Constitution does not authorize the Court to reverse a state conviction absent compulsion).

the absence of warnings. But this controversy has tended to obscure the most important and troubling aspect of the decision. *Miranda*'s exclusionary rule was clearly foreshadowed by the cases that preceded it, which had thrown substantial doubt on the use of uncounseled station house confessions.[64] What was new and problematic about *Miranda* was not the Court's articulation of the defendant's rights in the station house, but rather its articulation of the way in which a defendant could give up those rights. *Miranda* replaced the vague, amorphous, and fact-specific analysis of whether a particular defendant's will had been overborne with a clear and relatively simple procedure for the police to follow. And it offered the police the promise that if that procedure was followed, the resulting confessions would be admissible.

Thus, the *Miranda* Court did not hold, as some law enforcement officials feared that it would, that all uncounseled confessions were inadmissible. Although the Court rejected the view that waiver of the rights to silence and counsel could automatically be inferred from the mere fact of warnings followed by a confession, it clearly anticipated that confessions would be admissible in cases where the defendant was adequately warned and chose to waive his rights.[65]

As the matter has worked out in practice, the police are more or less guaranteed an admissible confession if they read the defendant his rights and secure from him a statement that he understands the rights, that he does not desire counsel, and that he wishes to make a statement.[66] Although due process voluntariness arguments remain available to challenge confessions even when *Miranda* waivers are obtained, most confessions are vulnerable only in circumstances where the police fail to inform the defendant of his rights[67] or where the defendant chooses to invoke them.[68]

From the perspective of a preference coercion model of the fifth amendment privilege, this resolution seems doubly perverse. When a *Mirandized* suspect confesses to a crime, she makes two sorts of statements. First, she indicates that she does not want counsel and wants to

64. *See* Escobedo v. Illinois, 378 U.S. 478 (1964) (confession suppressed when defendant not permitted to see lawyer who wished to see him); Massiah v. United States, 377 U.S. 201 (1964) (surreptitious interrogation by police agent in absence of counsel violated sixth amendment right to counsel); Spano v. New York, 360 U.S. 315 (1959) (failure to warn defendant of right to counsel contributed to finding that confession involuntary).

65. Although warning that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained," the *Miranda* Court held that "an express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." 384 U.S. at 475.

66. *See, e.g.*, North Carolina v. Butler, 441 U.S. 369 (1979) (an explicit statement of waiver is not invariably necessary to support a finding that a properly warned defendant waived *Miranda* rights).

67. *See, e.g.*, Mathis v. United States, 391 U.S. 1 (1968); Orozco v. Texas, 394 U.S. 324 (1969).

68. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981).

speak. Then, she recounts to the police facts about commission of the crime.

On a preference coercion theory, the first statement should be constitutionally vulnerable. *Miranda* proceeds on the assumption that custodial statements made in the absence of counsel and in response to police interrogation are inherently compelled. The statement "I do not want a lawyer," made while in custody and in response to a question, is therefore compelled and cannot, on a preference coercion theory, reveal the suspect's actual preferences. Yet *Miranda* seems to allow the police to rely upon such a statement to shield the subsequent confession from constitutional attack.

A defender of *Miranda* might respond that the *Miranda* warnings themselves dissipate the coercion that otherwise infects custodial interrogation and therefore permit us to learn the suspect's actual preferences as between speech and silence. Perhaps there is something to this view. There may be some cases where it will make a real difference to an incarcerated suspect when he is told that he has a right to remain silent and to the presence of counsel. But over the range of cases, the assumption that the *Miranda* ritual makes an important difference is surely naïve.[69] The warnings inform the defendant that he has a right to the presence of counsel. That right, in turn, is based on the presumption that an incarcerated defendant who makes incriminating statements in the absence of counsel has been compelled in the constitutional sense. But if the presumption is correct, then it is hard to understand why any waiver secured in the absence of counsel is not similarly compelled.[70] The same implicit coercion that would cause the suspect to speak prior to *Miranda* is surely likely to cause him to execute the appropriate waivers in the post-*Miranda* world.[71]

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69. As Professor Alschuler has written:

> Apart from a handful of remorseful suspects, another handful who may seek conviction for political or other reasons, and a third handful who are innocent and able to clear themselves by talking, virtually no one under arrest makes a truly knowing and voluntary waiver of *Miranda* rights. . . . Each year, courts find multitudes of intelligent waivers by suspects who, had they understood their situations in the slightest degree, surely would have remained silent."

Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931, 1007 (1983).

70. The comments of a prosecutor surveyed by an American Bar Association committee on the impact of constitutional rights on crime control summarize the point:

> [A] good police officer [could talk defendants into confession before or after] there was a *Miranda*, . . . and so it had no real impact at all upon the ability of good police officers to get confessions. [O]nce you have a defendant who has either signed or else there is good evidence that he has been advised of his rights, there is not a jury, or really a thinking judge, it seems to me, who is going to find that there wasn't a waiver and indeed, that the confession that came thereafter wasn't voluntary.

American Bar Association, Criminal Justice in Crisis 29-30 (1988). Other prosecutors, judges, and police officers surveyed by the committee strongly supported this conclusion. *See id.* at 27-34.

71. It should therefore come as no surprise that most studies have shown no decline in the rate of confessions after implementation of the *Miranda* procedures. *See, e.g.*, Medalie, Zeitz & Alexander,

In Part III, I will argue that this paradox is symptomatic of a broader difficulty that lies close to the root of constitutional theory. For present purposes, however, it is important to recognize that a preference coercion theory also has a problem accounting for the second half of *Miranda*'s holding. Suppose a defendant, who is not warned or fails to waive his rights, makes incriminating statements. Even if the defendant is thereby compelled, as *Miranda* insists that he is, there is still no conceptual reason why these compelled statements about facts in the world cannot be true. Why then should they be suppressed?

Of course, there is a sense in which even a suspect's recounting of prior events reflects no more than internal mental states. No confession can ever constitute a transparent window on external reality. At best, the suspect is telling us what he *believes* to be true rather than what *is* true in some ultimate sense. It might therefore be argued that even statements concerning facts in the world are, in some sense, statements about internal beliefs.

But this will not do. Although the speaker can tell us only what he believes to be true, the government is not interested in these statements because they reflect his internal beliefs. Rather, the statements are important (and will be introduced against the speaker) only because they are evidence of some external state of affairs. The situation is thus crucially different from the case in which the suspect says that he does or does not want a lawyer, or in which Doe says that he does or does not consent to release of his bank records. The government should be interested in those statements only to the extent that they accurately reflect an internal preference or belief, and not because they are evidence of some external state of affairs.

Moreover, it is important that when Doe was required to sign the consent directive, he was not simply coerced to tell us *whether* he consented. The Court's order required him to state *that* he consented. Similarly, a *Mirandized* suspect who waives his right to counsel, has, on *Miranda*'s own premises, been coerced into stating a particular preference—i.e., the preference for speaking to the police in the absence of counsel. It is this effort to make a subject have a particular preference that is irrational. There may, of course, be instances where a suspect is similarly coerced to make a particular statement. But *Miranda* protects suspects even if the coercion amounts to no more than pressure on the suspect to make a statement, without regard to its content.

A more plausible argument for a preference coercion justification for *Miranda* rests on the recognition that compelled cooperation, even when it fails to reveal the defendant's true preferences, may serve to legitimate

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Custodial Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347 (1968). For discussions of the empirical evidence, see American Bar Association, Criminal Justice in Crisis 27-34 (1988); Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 456 (1987); White, *Defending Miranda: A Reply to Professor Caplan*, 39 Vand. L. Rev. 1, 18-21 (1986).

levels of punishment that could not be rationally justified on an accurate cost/benefit analysis.

In order to see why this is so, we need to return to a question left unanswered in the previous section: if it is really true that internal preferences cannot be coerced, why would government officials be tempted to try to accomplish the impossible? After all, the very fact that the effort to compel internal preferences is irrational might be thought to provide a built-in protection against the use of coercion by state officials to achieve this end.

But although preferences cannot be compelled, conduct can be, and compelled conduct can be made to stand for the preferences that government officials cannot create. These superficial signs of changed preferences—as false and misleading as they may be—may nonetheless be useful to the state because they shield us from the full implications of our actions when we punish a defendant.

Punishment always involves the infliction of pain, and almost all of us are ambivalent about the exercise of this sort of power over individuals. We therefore want the defendant himself to acknowledge the rightness of the punishment and the justice of what we are doing to him. If the defendant himself wishes to be punished (or at least acquiesces in the punishment), then we can tell ourselves that we are not simply acting sadistically towards him, but are vindicating principles the justice of which even the defendant acknowledges. Perhaps we are even acting for his own good.

The evidence is all around us that people use coercion in order to fool themselves in this way. Consider, for example, the Moscow "show-trials" of the 1930s. Stalin had at his disposal sufficient force to liquidate his political opponents and to control all of their external behavior. But anyone who thought that this was all that the public confessions and humiliation were about missed half the point of the trials. The show trials were atrocities precisely because Stalin's objective was not solely to eliminate opposition, but to force the defendants to acknowledge their own guilt and the justice of their own executions.[72] Of course, this objective could never be achieved. Stalin could coerce the outward signs of agreement and submission, but no amount of force could achieve actual consent.[73] Yet the futility of the exercise did not prevent the infliction of great pain in the effort to create the illusion of achieving the unachievable.[74]

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72. As my colleague Mark Tushnet has written:

> A liberal's horror at Rubashov's degradation in *Darkness at Noon* rests only in part on the judgment that imposing practical consequences of beliefs is bad, and even more on the judgment that dictating belief—insisting that, no matter how one behaves, what matters is what one believes—is much worse.

Tushnet, *Religion In Politics*, 89 Colum. L. Rev. 1131, 1144 (1989).

73. For example, many of those who publicly confessed during the show trials continued to use veiled language that hinted at the falsehood of what they were admitting. For an account, see N. Leites & E. Bernaut, Ritual of Liquidation: The Case of the Moscow Trials 276-336 (1954).

74. As Robert Conquest has noted, the illusion was useful even when the confessions themselves

Fortunately, our own country has been free of anything remotely comparable to Stalinist purges. But some of the same impulses are apparent in watered-down form in our own culture. Consider, for example, the recent public demand that President Reagan "apologize" for his approval of the "Iran-Contra" operation and acknowledge the wrongness of his decision. It is quite mysterious why we should want such an apology, or, indeed, how a statement extracted under the threat of political reprisal can tell us anything about whether the President was actually "sorry." Yet the public desire for such a statement—meaningless as it inevitably would have been—was palpable.

A similar desire regularly manifests itself in the context of criminal prosecutions. It is most readily apparent in the ritual surrounding guilty pleas and allocution at sentencing reenacted thousands of times each day in courtrooms throughout the country. The only point of this ceremony is to provide outward evidence of the compelled restructuring of internal preferences.

Typically, the defendant has already agreed to a bargained plea of guilty. By itself, the bargain consists of a straightforward trade whereby the defendant gains a reduction in sentence in exchange for saving the prosecution the process costs of a trial and the risk of an acquittal. But the price demanded by the prosecution usually consists of more than the requirement that the defendant undergo some period of incarceration. He must first stand before the judge, listen to a summary of the evidence, and affirm that he is freely and voluntarily waiving his right to trial and admitting his guilt.[75] Although the Supreme Court has affirmed the constitutionality of "*Alford* pleas" pursuant to which a defendant pleads guilty without actually admitting his guilt,[76] many judges and prosecutors refuse to accept such pleas.

Moreover, the implicit bargain often includes the additional requirement that the defendant publicly state his contrition for the criminal act. Prosecutors and judges never expressly tell defendants that they will receive a reduced sentence if they say that they are "sorry." But criminal defense attorneys know that expressions of remorse can lead to a more lenient sentence and therefore regularly urge their clients to make such statements.[77] Of course, this kind of implicit bargaining cannot produce

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were completely unbelievable.

> Even if the confession is disbelieved, a defendant who humbly confesses and admits that his opponents were right is to some extent discredited politically—certainly more than if, publicly, he had put up a stout fight. Even if the confession is disbelieved, it is a striking demonstration of the power of the State over its opponents.

R. Conquest, The Great Terror: Stalin's Purge of the Thirties 208 (1973).

75. *See, e.g.*, Fed. R. Crim. P. 11(c); Henderson v. Morgan, 426 U.S. 637 (1976).

76. *See* North Carolina v. Alford, 400 U.S. 25 (1970).

77. Section 3E1.1 of the federal sentencing guidelines specifically mandates a reduction in punishment for a defendant who "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction." There can be no doubt that this provision places pressure

actual remorse, any more than the explicit bargaining over the guilty plea itself can produce actual consent to the imposition of punishment. But the very fact that the bargaining goes on—that judges and prosecutors do on occasion grant concessions in order to secure such expressions—demonstrates that actors in the system attach some importance to these external signs of the restructuring of internal preferences and are willing to use the coercive forces at their disposal to produce them.

On this view, then, when a government official coerces a suspect to speak, she may be motivated by the desire to produce one of two possible results. She may be authentically interested in the information that the suspect can convey. If this were the state's only concern, there would be no objection to the use of coercion in order to secure it. We know this in part because we regularly permit the use of coercion to extract information from non-defendants. But when the defendant is coerced, the official may also be interested in producing the outward signs of a change in the suspect's inner preferences. Specifically, she may wish to create the illusion that the suspect has "freely" chosen to cooperate in his own destruction, thereby legitimating the punishment that the state is about to inflict.

Given the possibility of these two distinct motivations for the use of coercion, and given the difficulty of reconstructing after the fact which motive was determinative, a preference coercion theory might outlaw compelled incrimination as a prophylactic measure designed to prevent compulsion that is motivated by the desire to change the outward manifestation of preferences.

If this justification for the fifth amendment is correct, it might be thought that coerced confessions should be admissible as long as the prosecutor makes clear that they were in fact coerced—that they were secured against the defendant's will and in no sense manifested any desire by the defendant to cooperate with the prosecution. If the nonvoluntary nature of

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on defendants to acknowledge their guilt publicly. As the United States Court of Appeals for the Fifth Circuit recently noted,

> accepting responsibility for a crime entails admitting the crime, while trial strategies predicated upon a claim of innocence entail denial of the crime. A defendant who maintains her innocence at trial, and then purports to accept responsibility afterward, may have a difficult time persuading the trial judge that her later position is sincere rather than merely convenient.

United States v. Thomas, 870 F.2d 174, 177 (5th Cir. 1989); *see also* United States v. Young, 875 F.2d 1357 (8th Cir. 1989).

Similarly, the American Bar Association Standards for Criminal Justice permit sentencing concessions when there is substantial evidence to show that "the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct." American Bar Association, Standards for Criminal Justice §14-1.8 (2d ed. 1980). Significantly, the commentary on this section recognizes that in a world where defendants receive sentencing concessions for guilty pleas, such pleas will often not reflect true contrition. But the Commentary suggests that this problem can be avoided if "the trial court interrogate[s] the defendant carefully in order to determine whether the defendant's guilty plea truly reflects repentance." *Id.* The Commentary thus requires defendants to undergo a public display of contrition and self-abasement in order to qualify for the sentencing concession. It seems to take no account of the ability of defendants and their attorneys to rehearse the correct behavior during this ritual.

the confession were clearly proclaimed—perhaps in a press release or in a document lodged with the court—then the confession would serve only to provide the prosecutor with information and would not contribute to the illusion that the defendant acquiesced in her own punishment.

In fact, when the prosecutor is able to claim credibly that evidence was obtained without *any* cooperation from the defendant, then the privilege is unavailable. Thus, the Court has held that evidence seized from a defendant against her will is not within the scope of the privilege.[78] Similarly, when the defendant's conduct is *clearly* non-volitional—when the state has the capacity to do something to her without her cooperation—then the privilege is not available. This is the teaching of cases such as *Schmerber* and *Fisher*, which treat as nontestimonial compelled submission to blood tests or production of papers.[79]

If we had a widely accepted and coherent model for free will—the kind of model that might grow out of a broader normative theory—it might be possible for the state to make plausible claims that the defendant had not acted volitionally as we moved away from these core cases. But recall that a preference coercion theory represents an effort to make do without a theory about the kinds of social interaction that are a necessary prerequisite for freedom.[80] And in the absence of a noncontroversial theory of freedom, whenever the defendant accedes to state encouragement or pressure, her action in some sense amounts to an exercise of will. This decision to cooperate in turn reflects—or, more accurately, might be treated as reflecting—the defendant's acquiescence in the legitimacy of her own punishment, thereby reducing the psychic costs to the rest of us of imposing the punishment.[81]

Of course, it might still be thought that this effect is vastly outweighed by the state's authentic need for evidence that can be secured from only the defendant's own mouth. It is precisely for this reason that defenders of the privilege often buttress their case by rhetoric claiming that the privilege only rarely deprives police of evidence that they need[82]—that it sim-

78. *See* Andresen v. Maryland, 427 U.S. 463 (1976).

79. *See supra* text accompanying notes 28-29, 31-35.

80. *See supra* text accompanying note 8.

81. I will argue below that this theory, like all constitutional theories, requires its proponent to stand outside the theory. The argument in the text illustrates why this is so. As explained in the text, the preference coercion theory is premised on the belief that others in society lack a coherent model of freedom that will permit them to distinguish between willed acts of cooperation that legitimate punishment on the one hand and compelled acts that do not on the other. Yet an advocate of the preference coercion theory must himself have a view of the kinds of interaction that are necessary for an act to be free. This is so because the advocate must identify cases where the government has impermissibly attempted to coerce the defendant into changing the outward manifestations of his preferences. For an argument that all constitutional theories necessarily suffer from a similar defect, *see infra* text accompanying note 106.

82. For example, defenders of *Miranda* often point to empirical studies showing that even where confession rates have declined following implementation of the *Miranda* procedures, conviction rates have remained constant. *See, e.g.*, Shulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 458 n.59 (1987).

ply redirects their energies away from the simple expedient of securing the evidence from the defendant's own mouth and toward alternative methods that do not require the defendant's cooperation.[83] The implication of this rhetoric is that there is an unacceptable risk that confessions will be utilized for the purpose of securing the outward signs of the defendant's acquiescence in his own punishment rather than for the purpose of securing otherwise unavailable information.

If this is a correct account of the motivation for attempting to coerce preferences, it provides a reason why a prophylactic rule would be especially necessary when a defendant is forced to make *self-incriminating* statements. Like the eighth amendment prohibition against cruel and unusual punishment,[84] the fifth amendment privilege serves as a means of avoiding excessive punishments. But whereas the eighth amendment serves this end by imposing restraints on specific sorts of punishments, the privilege does the same work by forcing us to confront the full implications of punishment. A prophylactic rule against forced restructuring of preference deprives us of the opportunity to hide behind the myth that defendants who have been coerced into making self-incriminating statements really want to make them and that they are thereby consenting to their punishment. If defendants are to be punished, on this view, then the punishment must be justified in a clear-headed fashion after accurately calculating all of the costs and benefits.

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83. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.")

84. When understood in this way, the fifth amendment privilege is closely allied with the cruel and unusual punishment clause. Consider the widely shared view that the eighth amendment outlaws corporal punishment. *See, e.g.,* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (any use of strap in Arkansas penitentiaries is cruel and therefore violates eighth amendment). On its face, the prohibition seems difficult to justify since many defendants, if given the choice, would doubtless view such punishment as much less "cruel" than years of imprisonment or death—punishments that the eighth amendment has been read to permit. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty constitutionally permissible when imposed under system of guided discretion); Rummel v. Estelle, 445 U.S. 263 (1980) (mandatory life sentence for third felony conviction based on obtaining $120.75 by false pretenses does not violate eighth amendment). *But cf.* Solem v. Helm, 463 U.S. 277 (1983) (life sentence without possibility of parole for seventh nonviolent felony violates eighth amendment). Moreover, since corporal punishment is much less expensive than incarceration for the state to inflict, there would seem to be gains to all concerned from its use.

Yet the very ease with which corporal punishment can be inflicted also suggests a risk. Because corporal punishment can be inflicted quickly and cheaply, there is a danger that it will be inflicted in anger—that it will reflect a noninstrumental desire simply to hurt the defendant, rather than an effort to use him so as to achieve the instrumental goals of deterrence and incapacitation. Thus, the inhibition against corporal punishment, like the fifth amendment privilege, can be justified as a bright-line rule designed to protect against noninstrumental uses of the criminal justice system. *See* Weems v. United States, 217 U.S. 349, 372-73 (1910):

> With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the [cruel and unusual punishment] clause.

Unfortunately, once the privilege is reformulated in this fashion, its soundness is no longer quite so uncontroversial as when it represented merely a conceptual truth. For example, if the privilege is to be defended as a prophylactic rule, its validity depends upon empirical facts concerning the frequency with which government officials coerce statements in order to create the illusion of a restructuring of preferences as compared to the frequency with which they are motivated by the desire to secure information. Even if we could agree on the answer to this question, a defense of the rule would also require normative agreement as to how to trade off the evil of one effect against the benefit of the other.

And the problems run still deeper. At best, the argument outlined above explains why we might want to *reject* the government's effort to use statements of fact secured in the absence of proper *Miranda* warnings. It fails to explain why we should *accept* a suspect's statement that he wishes to answer police questions and does not desire assistance of counsel—why, in other words, we ought not make *Miranda* rights nonwaivable as long as the defendant remains in custody without speaking to a lawyer. If custodial statements concerning facts about the world are presumptively coerced and should be rejected under the prophylactic rule described above, why should we accept similar statements that purport to reflect internal preferences secured under similar circumstances?

If one believes that the function of the privilege is to prevent obfuscation of the true costs of punishment, then our willingness to tolerate *Miranda* waivers is especially troubling. As argued above, *Miranda*'s central importance lies not in the rights that it established, but in the new mechanisms it provided for giving up those rights. On *Miranda*'s own theory, the waivers it mandates are themselves coerced, because they are a product of inherently coercive custodial interrogation. The *Miranda* ritual therefore does not serve to assure that admissible statements are "voluntary" or noncoerced. On the contrary, the only operative effect of the warnings and waiver is to conceal from us the fact that the statements are coerced. *Miranda* thus turns a preference coercion theory of the privilege on its head. Instead of forcing us to confront the true cost of punishment, the *Miranda* procedure creates the illusion that defendants who waive their rights and confess after *Miranda* warnings have freely acknowledged the legitimacy of their own destruction.

A cynic might explain *Miranda* on the grounds that it serves precisely this legitimating function. This view is supported by ample empirical data tending to demonstrate that the warnings do not in fact result in fewer confessions by incarcerated suspects[85]—and by the otherwise surprising failure of a conservative, law-and-order court to overrule the decision.[86]

85. *See supra* note 71.

86. Chief Justice Burger, no friend of the Warren Court's criminal procedure jurisprudence,

I do not want to reject this version of what *Miranda* is about, but I do want to deny that it represents the whole story. *Miranda* can also be understood as a product of our deep ambivalence about the individualist premises that undergird a preference coercion theory of the privilege. Those premises are the subject matter of the next section.

III. Preference and Community

The argument above has proceeded on the assumption that internal preferences and beliefs are individualistic and that they exist prior to and independent of social interaction. Internal preferences cannot be coerced, on this view, because they are a reflection of an atomistic and detached free will. There is, of course, another view of the matter. Much of modern social science, political theory, philosophy, and literary theory attempts to demonstrate that desires and beliefs are inevitably intersubjective and social. It is not meaningful to talk about disembodied preferences. These mental states are always situated within a culture and molded by forces that make various choices more or less attractive.

This final section argues that the law surrounding the fifth amendment privilege is caught between these two conflicting models of human behavior. This tension, in turn, is a manifestation of an antinomy that underlies the broadest questions in constitutional theory.

The tension is apparent right at the surface of *Miranda*. On the one hand, the opinion is the lineal descendent of a long line of earlier cases concerning overt police coercion (torture, brutality, etc.) directed toward criminal suspects.[87] These cases take as their starting point a suspect with a fixed preference for silence. Although this preference is not changed by police coercion, the coercion nonetheless forces the defendant to speak. The defendant is thus made to do something "against his will." The police, representing the community, have invaded a private, preexisting space that is properly under the domain of the individual.

Yet on the other hand, *Miranda* is importantly different from at least the earlier cases in this series. The problem that concerned the *Miranda*

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wrote that "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). In fact, in some respects the modern court has extended *Miranda*. *See* Edwards v. Arizona, 451 U.S. 477 (1981) (creating new per se exclusionary rule for confessions obtained after defendant has requested counsel unless subsequent contact is initiated by defendant).

A recent empirical survey concludes that "[a] very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement." American Bar Association, Criminal Justice in Crisis 28 (1988). As Professor Schulhofer points out, "the view that *Miranda* posed no barrier to effective law enforcement [has] become widely accepted, not only by academics but also by such prominent law enforcement officials as Los Angeles District Attorney Evelle Younger and Kansas City police chief (later FBI director) Clarence Kelly." Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 456 (1987).

87. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936); Ward v. Texas, 316 U.S. 547 (1942); Malinski v. New York, 324 U.S. 401 (1945).

Court was not predominantly overt police brutality, which was adequately covered by earlier due process decisions. Rather, the Court's main concern was more subtle police techniques that did not so much overcome the defendant's will as change it. The Court's lengthy excerpts from police interrogation handbooks were designed to demonstrate that through artful manipulation of the environment, the police could actually restructure the suspect's internal preferences.[88] Psychological pressure might enable the state to harness the defendant's will for its own purposes, thereby avoiding the necessity of overcoming his will by more primitive techniques. Thus, the reason why custodial interrogation was inherently coercive, even in cases where there were no outward signs of brutality or compulsion, was because it had this potential to change what the suspect wanted, at least for a brief period.

This second strand in *Miranda* grows out of the view that preferences are not individual, autonomous, and preexisting. Instead, they are socially constructed in the course of the very transaction that the court is asked to review. On this view, the problem with custodial interrogation is not that it might represent a doomed effort to restructure preferences, but that it risked succeeding in such a restructuring.

Significantly, for the *Miranda* Court, the intersubjectivity of preferences was not only part of the problem, but also part of the solution. Thus, the Court required a certain kind of social interaction between the police and the suspect—the now-famous warning and waiver ritual—on the theory that this interaction would itself serve to construct certain preferences with regard to speech and silence. Moreover, the right to consult with a lawyer—the right at the center of the *Miranda* warnings—makes sense only as an effort to construct socially certain preferences.[89]

But although an intersubjective understanding of preferences is necessary to make sense of *Miranda*, such an understanding also posed important problems for the *Miranda* majority. If preferences are not autonomous and temporally prior to interaction, then there is no preexisting state of affairs that requires protection. There is simply a choice between different sorts of interactions that will produce different preferences. An

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88. *See* 384 U.S. at 448-56.

89. In his dissenting opinion, Justice White argued that the Court deliberately required the type of social interaction that would maximize the chances of the defendant remaining silent.

> The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not.

384 U.S. at 537 (White, J., dissenting). Perhaps this view is unfair to the *Miranda* majority. But even if the majority opinion is not premised on the Justices' own preference for silence over confession, it clearly does rest on a view that "real" or "valid" preferences can only be expressed in the context of a certain type of social interaction—i.e., as the outcome of deliberation between lawyer and client.

intersubjective approach thus fails to explain why we ought not mandate—or at least permit—the type of interaction that will produce a preference for socially useful self-incrimination.

The *Miranda* Court avoided this critique by adopting inconsistent assumptions about the nature of preferences. For some purposes, preferences are presumed to be fixed and autonomous. That is why they are worthy of protection. That is also why the police must pay attention to the preference expressed in the waiver or assertion of *Miranda* rights. Yet for other purposes, they are presumed to be contextual and interactive. That is why it is important for the suspect to listen to the warnings and have the opportunity for interaction with a lawyer before he makes his preferences known.

This ambivalence about the nature of preferences extends beyond the problem of custodial interrogation. It was built into the privilege from the beginning. As already noted, the privilege grew out of efforts to protect the rights of religious and political dissenters.[90] These dissenters were not (or at least not simply) exercising individual rights. The individuals protected were members of religious and political communities, and their nonconformist views were molded by this community experience. At its inception, then, the privilege seemed to recognize that preferences were social. Indeed, it was precisely because an individual's identity was closely linked to a collective experience that nonconforming groups were worthy of protection.

Modern fifth amendment law has reversed this initial understanding. Today, individuals are often deemed to have waived their fifth amendment privilege if they engage in group activity.[91] Although the origins and scope of this limitation on the privilege are somewhat obscure,[92] it seems to grow out of the view that the preferences protected by the privilege are individual and autonomous—that they exist independently of collective activity.[93] This is so because individual preferences and beliefs are tempo-

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90. *See supra* text accompanying note 43.

91. *See, e.g,* Braswell v. United States, 108 S. Ct. 2284 (1988); Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944).

92. Originally, the rule was applied to corporations and was premised on the reserved visitorial powers of the state over entities that had no right to exist without state permission. *See* Hale v. Henkel, 201 U.S. 43, 74 (1906); Wilson v. United States, 221 U.S. 361 (1911). But this rationale has not survived the Court's extension of the rule to unincorporated associations that do not exist at the pleasure of the state. *See, e.g.,* United States v. White, 322 U.S. 694 (1944) (labor unions); Bellis v. United States, 417 U.S. 85 (1974) (partnerships).

93. Thus, the Court's more recent articulations of the rule have emphasized the loss of personal privacy that comes with collective activity. *See, e.g.,* Bellis v. United States, 417 U.S. 85, 93-94 (1974):

> Some of the most powerful private institutions in the Nation are conducted in partnership form. Wall Street law firms and stock brokerage firms provide significant examples. These are often large, impersonal, highly structured enterprises of essentially perpetual duration. The personal interest of any individual partner in the financial records of a firm of this scope is obviously highly attenuated.

See also United States v. White, 322 U.S., at 699 ("individuals, when acting as representatives of a

rally prior to group activity. They are what individuals bring to the group, rather than what the group creates. It follows from this view that a privilege for individual preferences adequately safeguards autonomy and that group expressions of preference are not worthy of protection.

This reversal would be interesting even if the modern view were simply a perversion of the original understanding of the privilege. But it is not simply a perversion. The individualist conception of the privilege was also present from the outset and coexisted uneasily with the contrary communal view. Torture and inquisitorial techniques were objectionable precisely because they overrode individual conscience. State prosecution of dissenters was dangerous because it threatened to swamp the individual and to treat him as no more than a tool for the advancement of the collective good. The normative attractiveness of the privilege thus rested crucially on the autonomy of preferences. Without such a view, it is hard to generate an argument for why the state should be deprived of the ability to mold preferences in a fashion that is utility-maximizing.

It seems plausible, then, that the confusion and controversy surrounding the privilege derives, in some measure, from our ambivalence about competing individualist and group models for the formation of preferences. Moreover, this antinomy is not a peculiar characteristic of fifth amendment doctrine. It would not overstate matters to say that it is a defining characteristic of modern constitutional law.

For example, the current debate between advocates of pluralist and neo-republican theories of the Constitution can be conceptualized in these terms. Pluralists tend to treat preferences as individual and autonomous. For them, the political system simply measures and aggregates these preferences, and the purpose of the Constitution is to insure that they are measured and aggregated fairly and accurately.[94]

Neo-republicans, in contrast, see preferences as growing out of a collective experience. For them, politics involves the formation of preferences, rather than simply their measurement. Thus, the Constitution is not automatically satisfied when the government reflects the desires that people bring to political decisions. Rather, the Constitution guarantees a deliberative process with transformative potential. People can be put in a setting where their preferences will change, and the purpose of the Constitution is to create a context in which they will change for the better.[95]

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collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges"). Somewhat anomalously, the Court nonetheless continues to apply the rule automatically to corporate entities even in cases where a single individual is the sole shareholder of the corporation. *See* Braswell v. United States, 108 S. Ct. 2284 (1988).

94. For a discussion, see Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 Yale L.J. 1006, 1013 n.31 and sources cited therein.

95. For representative examples of the growing body of literature of this sort, see Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689; Sunstein, *Interest Groups in American Law*, 38 Stan. L. Rev. 29 (1985); Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L.

The Supreme Court's treatment of equal protection arguments in *United States Railroad Retirement Board v. Fritz*[96] and *City of Cleburne v. Cleburne Living Center*[97] illustrate these contrasting approaches. In *Fritz*, the Court rejected a constitutional challenge to the manner in which Congress restructured the railroad retirement system. Justice Rehnquist's majority opinion proceeds from pluralist premises. Thus the Court rejects the effort to impose some normative standard of equity on the division of the limited funds available for the retirement system. Rather,

> the plain language of [the statute] marks the beginning and end of our inquiry. There Congress determined that some of those who in the past received full windfall benefits would not continue to do so. Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits.[98]

This skepticism about the possibility of an external, normative standard of equity is closely related to the view that politics involves no more than the measurement of preexisting, individual preferences. It was thus irrelevant that the Congress which had enacted the challenged statute engaged in no actual deliberation about it and, indeed, was apparently unaware of what it was doing.

> [W]e disagree with the District Court's conclusion that Congress . . . was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted. To be sure, appellees lost a political battle in which they had a strong interest, but this is neither the first nor the last time that such a result will occur in the legislative forum.[99]

The *Fritz* Court's tautological assertion that the scope of constitutional review is dictated by the very congressional decision under review contrasts sharply with the more activist stance in *Cleburne*. The *Cleburne* court invalidated a zoning ordinance that prevented the erection of a group home for the mentally retarded in a residential neighborhood. This conclusion was markedly influenced by a neo-republican conception of politics. Significantly, there was no indication in Justice White's majority

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Rev. 4 (1986). *See generally Symposium: The Republican Civic Tradition*, 97 Yale L.J. 1493 (1988).

96. 449 U.S. 166 (1980).
97. 473 U.S. 432 (1985).
98. 449 U.S. at 176-77.
99. *Id.* at 179.

opinion that the Cleburne City Council had inaccurately measured and aggregated the preferences that individuals brought to the zoning process. Instead, the problem was that these individual preferences themselves were normatively unacceptable.

> [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole [could] not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some faction of the body politic.[100]

The *Cleburne* Court thus envisioned judicial review as something more than a guarantee that preexisting preferences are adequately reflected in political decisions. Judicial review was also a mechanism for *changing* those attitudes—for insuring, in Justice White's phrase, that they do not rest on "irrational prejudice." In this sense, Justice White's opinion is part of a tradition that includes Earl Warren's majority opinion in *Brown v. Board of Education*[101] and Louis Brandeis' concurrence in *Whitney v. California*[102]—a tradition that stands in stark contrast to that represented by *Barnette*. Decisions like *Brown* and *Cleburne* treat preferences as dynamic rather than static and interactive rather than individualistic. Moreover, they treat government as having an important role in establishing the proper context in which the right sort of preferences will emerge. Thus, compelled racial integration is justified because the compulsion will produce a new context out of which the "correct" preferences will emerge.[103] Similarly, for Justice Brandeis it was important for courts to foster free debate about public issues in part because such debate would in turn educate an involved populace in the duties of citizenship.

It is not enough, however, to see that *Fritz* and *Cleburne* reflect contradictory conceptions of politics and that these conceptions are related to different models of preference formation. The cases also demonstrate that pluralist and neo-republican conceptions, although contradictory, are also parasitic on each other. Thus, the *Cleburne* court's analysis seems to reject the view that individual preferences are fixed and exogenous to the analysis. That is why they are subject to normative criticism. Yet the Cleburne City Council's preferences regarding the mentally retarded are normatively unacceptable precisely because they violate the tenets of indi-

100. 473 U.S. at 448.
101. 347 U.S. 483 (1954).
102. 274 U.S. 357, 372 (1927).
103. For a discussion, see Gewirtz, *Choice in Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728 (1986).

vidualism. The "irrational prejudice" that motivated the invalid ordinance amounted to an unwillingness to treat as autonomous and equal the individual desires of people suffering from mental retardation.

Conversely, the *Fritz* Court's unwillingness to engage in normative criticism of the preferences that individuals bring to the political process itself masked a normative preference for a particular political process. The *Fritz* plaintiffs argued that our political process included an activist court imposing normative standards on the distribution of retirement benefits. The Court's rejection of this version of the process in favor of a version in which Congress has the last word must reflect some view about the best context in which preferences are to be formed and expressed.[104]

It turns out, then, that the argument between pluralists and neo-republicans does not neatly track the dispute about the nature of preference formation. There is a sense in which both pluralists and republicans adhere to both the individualist and communal model.[105] Indeed, my final claim is that conflicting assumptions about the nature of preferences are built into virtually any theory for thinking about constitutional law.

To see why this is so, imagine the position of the framers of a constitutional document. On the one hand, the impetus to write a constitution usually comes from some sort of theory that treats preferences as situated and context-dependent. The reason for preferring one constitution over another—the reason for caring about constitutional law—typically rests on a prediction about the kinds of preferences that will gain expression in one system as opposed to another coupled with a normative judgment about the desirability of giving those preferences expression. For example, the Federalists and Anti-Federalists who argued over the United States Constitution were divided about which system of government would best safeguard civic virtue and ward off the corrosive influence of faction. They were largely united in their judgment about the desirability of promoting civic virtue and avoiding factional strife.

Yet the framers themselves must also stand outside the theory that they are advocating. They must view their own preferences as fixed and autonomous. If they were not—if the framers saw these preferences as simply the product of the context in which they happened to work—there would be no reason to care about them.[106]

Thus, the Federalists and Anti-Federalists argued about whether the new Constitution would produce a context that was conducive to the political outcomes that they viewed as normatively attractive. Yet both sides

104. For a more extended discussion of this point, see Wasserstrom & Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L.J. 19, 70, 103-05 (1988).

105. For example, Justice Rehnquist, who authored the majority opinion in *Fritz*, also joined Justice White's majority opinion in *Cleburne*. Justice White, in turn, joined Justice Rehnquist's *Fritz* opinion.

106. For a similar argument in the context of public choice theories of constitutionalism, see Tushnet, *Public Choice Constitutionalism and Economic Rights* (forthcoming).

seemed to view their own opposing arguments as independent of context. If they were to concede that these arguments were instead simply the by-product of the way in which the constitutional convention happened to be structured—that they would have a different set of preferences had the group experience been differently structured—then they would be denying that their own arguments had the normative force that they wished to attribute to them.

IV. Conclusion

The fifth amendment privilege poses a puzzle we are unlikely to solve. This is so because it is part of a larger enigma. We live our lives as if our own preferences were autonomous and belonged to us as individuals. Yet, all the while believing this, we also somehow manage to glimpse the reality that our preferences are situated and intersubjective. When we see the world in the first way, we can also see that government coercion designed to change preferences can succeed only in changing the outward manifestation of those preferences. When we see it in the second, we see the possibility that government might in fact mold our preferences and that we would be collectively better off for the change.

Our evaluation of the privilege is caught between these two intuitions. The privilege forms a part of a perspective that allows us to act upon our beliefs. Our rejection of it forms part of a perspective that allows us to transcend those beliefs so as to make critical judgments about our actions. Unless we are to give up our ability to act, or our ability to think about how we act, we are bound to remain irresolute.